Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-933

EVELYN PORTER,
Appellant,

vs.

JACK E. PORTER,
Appellee.

ON APPEAL FROM THE TENNESSEE COURT OF APPEALS FOR THE MIDDLE SECTION

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

EVELYN PORTER,
Appellant,

vs.

JACK E. PORTER,
Appellee.

ON APPEAL FROM THE TENNESSEE COURT OF APPEALS FOR THE MIDDLE SECTION

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Tennessee Court of Appeals for the Middle Section, entered on April 27, 1979, affirming the decision of the Circuit Court of Macon County, Tennessee, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The rulings of the Supreme Court of Tennessee denying the appellant's Petition for a Writ of Certiorari and denying the appellant's Petition for a Rehearing of the Petition for a Writ of Certiorari are not reported. The

opinion of the Court of Appeals for the Middle Section is unreported. The findings of fact and conclusions of law of the Circuit Court of Macon County are unreported. Copies of these orders and opinions are attached hereto as Appendix I.

JURISDICTION

This action was brought by appellee pursuant to Tenn. Code Ann. §§36-801 *et seq.*, seeking a divorce, custody of the parties' child and, pursuant to Tenn. Code Ann. §36-825, a division of the jointly owned property.

On April 27, 1979, the Court of Appeals for the Middle Section entered its Opinion affirming the Trial Court's award to appellee of virtually all of the parties' jointly owned property. The Supreme Court of Tennessee denied appellant's Petition for a Writ of Certiorari in its Memorandum of July 30, 1979, and subsequently denied appellant's Petition to Rehear in its Memorandum of September 17, 1979.

Notice of Appeal was filed in the Tennessee Court of Appeals for the Middle Section on December 5, 1979.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, §1257(2).

The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *American Motorists Ins. Co. v. Starnes,* 425 U.S. 637, 48 L.Ed.2d 263, 96 S.Ct. 1800 (1976); *Dyke v. Taylor Implement Co.,* 391 U.S. 216, 20 L.Ed.2d 538, 88 S.Ct. 1472 (1968); *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61 (1928).

QUESTIONS PRESENTED

(1) When a husband's and a wife's contributions to jointly owned property are substantially equal, and upon a divorce the husband is awarded custody of the parties' thirteen year-old son, is the award to the husband, under the authority of Tenn. Code Ann. §36-825, of virtually all of the jointly owned property, without any compensation for the wife, so palpably unreasonable as to constitute a taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

(2) Is Tenn. Code Ann. §36-825, which grants to the Court in divorce cases jurisdiction to divest property from one spouse and vest it in the other "as may be just and reasonable," a statute which is so vague as to be void under the Fourteenth Amendment to the Constitution of the United States?

STATUTE INVOLVED

Tenn. Code Ann. §36-825 appears in volume 6A of the 1977 Replacement of the Official Edition on page 435 and reads as follows:

> **Adjustment of interest in jointly owned property.**
>
> —In actions for divorce or separate support and maintenance, the Court having jurisdiction thereof may, in its discretion, adjust and adjudicate the respective rights and interests of the parties in all jointly owned property, so as to preserve for each or either party, that portion of such jointly owned property as may be just and reasonable under the facts and circumstances of the case, regardless of how the Court may grant or refuse to grant relief in such case; and to

this end the Court shall be empowered to effectuate its decree by divesting and reinvesting title to such property and, where deemed necessary, to order a sale of such property and to order the proceeds divided between the parties. [Acts 1953, ch. 90, §1 (Williams, §8446); 1959, ch. 192, §1.]

Statement

Appellee and appellant were husband and wife for 24 years, during which time they acquired through their joint efforts agricultural property in Macon County, Tennessee, valued at nearly $500,000.00. There is no dispute that appellant's contributions to the purchase and maintenance of the property were substantial. Although her conduct during the marriage gave appellee sufficient ground for divorce under Tenn. Code Ann. §§36-801 *et seq.*, that conduct was invoked by the Trial Court as grounds for divesting her of all the jointly owned property in which she had an interest. Her interest arose out of the marriage, her toil, talent and money which she had contributed to acquire the property. While appellant was "awarded" the modest real estate business she had built up since 1973, its only appreciable asset was her personal services. Furthermore, the Trial Court specifically noted that it did not hold the real estate business to be jointly owned property, and was therefore, not subject to being divided by the Court under Tenn. Code Ann. §36-825.

In the Tennessee Court of Appeals for the Middle Section, appellant, in her first assignment of error, drew into question the constitutionality of the Trial Court's application of §36-825, Tennessee's property division statute, by citing the Court of Appeals to the case of *Kittrell v. Kittrell,* 56 Tenn.App. 584, 409 S.W.2d 179 (1966), in

which there is set forth the bounds of an application of §36-825 which is valid under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals, *sub silentio,* rejected appellant's argument that the statute had been applied in an unconstitutional fashion by stating in the third to the last paragraph of its Opinion that it found "no error in the division of property."

Although the Court of Appeals posited as other grounds for the Trial Court's application of the statute, the fact that appellee was awarded custody of the parties' thirteen year-old son and the concomitant burden of support, appellant respectfully submits that the value of the property bears no conceivable relation to the expense of supporting the child until he reaches majority and that §36-825 is still being applied in such a way as to deprive her of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Questions Are Substantial

Several states have enacted statutes providing that in divorce actions Courts shall have the power to divest property interests and reinvest them in the other spouse. In general and in Tennessee, the Courts are guided only by the requirement that property adjustments be just and reasonable. This Court has never ruled on the questions presented in this appeal, which arise out of the vagueness of Tenn. Code Ann. §36-825 and its arbitrary application by the Courts.

Statutes in some states enumerate the factors to be considered in dividing property rights, *e.g.,* Md. Cts. and Jud. Proc. Ann. §§3-6A-05(b)(1)-(9) and 3-6A-06(a)(1)-(4). In other states the Courts have announced that judicial guidelines of interpretation cure the vagueness of

the statutory language, *e.g., Painter v. Painter,* 65 N.J. 196, 213, 214, 320 A.2d 484, 493 (1974). But the problem of judicial abuse of fundamental rights persists in Tennessee, where neither statutory nor judicial standards are available. A lawyer can only guess where the Trial Court's whims may lead, and a litigant must proceed to trial unable to evaluate meaningfully the possibility that he or she will be stripped of hard earned property without compensation, in violation of the fundamental rights explained in *Thompson v. Consolidated Gas Utilities Corp.,* 300 U.S. 55, 80, 81 L.Ed. 510, 57 S.Ct. 364 (1937).

When a statute creates a regime under which a person can become dispossessed and his or her property be given to another without compensation upon the bare conclusion by a Court that it is just and reasonable, and when that conclusion is drawn from circumstances the consideration of which has no reasonable connection to the deprivation effected, the regime created by that statute is palpably unfair, and this Honorable Court should welcome the opportunity to assure that it not prevail over the direct limitations erected by Federal Due Process. The abuse by the Tennessee courts of appellant's fundamental right to property, in addition to the likelihood that it can occur as a matter of course in Tennessee and in other states where similar statutes exist, indicate that the issues raised by appellant are so substantial as to require plenary consideration, with Briefs on the merits and oral arguments.

The Tennessee Court of Appeals for the Middle Section decided that the division of property was not erroneous. Although the record does not reflect that the constitutional question was raised in the Trial Court, that does not mean that it was not timely raised, because the Court of Appeals reviewed the case *de novo* and expressly considered and ruled on the question whether the property

division was proper. Since the Supreme Court denied the Appellant's Petition for a Writ of Certiorari, the judgment of the Court of Appeals is final under 28 U.S.C. §1257(2). *American Motorists Ins. Co. v. Starnes,* 425 U.S. 637, 48 L.Ed.2d 263, 96 S.Ct. 1800 (1976).

By assigning as error the Trial Court's failure to rule in accord with *Kittrell v. Kittrell,* 56 Tenn.App. 584, 409 S.W.2d 179 (1966), which outlines the extent to which Tenn. Code Ann. §36-825 is consistent with the Fourteenth Amendment, the record shows by fair intendment that appellant fairly and timely drew in question the constitutionality of the Trial Court's application of §36-825 as well as that statute's validity under the Fourteenth Amendment to the Constitution of the United States. According to *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61 (1928), the Fourteenth Amendment question was raised in such a manner as to require the exercise of appellate jurisdiction by this Court.

In affirming the Trial Court, the Court of Appeals advances alternative non-federal grounds relating to the manner in which the bill of exceptions was certified for review, but that Court specifically states that that technicality did not foreclose consideration of the propriety of the division of property. In light of their ruling that the division of property was correct, the Fourteenth Amendment question raised by the First Assignment of Error necessarily must have been decided, even though the Court failed expressly to rule on the question. The appeal is, therefore, properly before this Honorable Court. *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61 (1928).

Because the Court of Appeals must have considered the property division in light of *Kittrell v. Kittrell,* 56 Tenn.App. 584, 409 S.W.2d 179 (1966), and the constitu-

tional questions there discussed, the omission from Appellant's Assignments of Error of specific reference to the Fourteenth Amendment should not bar her appeal to this Court. *Dyke v. Taylor Implement Co.*, 391 U.S. 216, 20 L.Ed.2d 538, 88 S.Ct. 1472 (1968).

Furthermore, appellant's claim that Tenn. Code Ann. §36-825 is void for vagueness and her claim that it was applied in a palpably unreasonable fashion are both encompassed within the Fourteenth Amendment, so her failure to detail the constitutional objections should not take this case out of the appellate jurisdiction conferred by 28 U.S.C. §1257(2). While the record reflects that this appeal may not fall as squarely within that jurisdiction as may be preferred, the terms of §1257(2) are satisfied.

In light of the compelling nature of the case, and the necessity that this Court end the abuse of power occasioned by Tennessee's property division statute and others like it, the questions raised can be, and should be, considered and resolved.

Respectfully submitted,

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APPENDIX I

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE
NO. 13,218

JACK E. PORTER	)	
	)	
Plaintiff-Appellee	)	
	)	
vs.	)	MACON LAW
	)	
EVELYN PORTER	)	
	)	
Defendant-Appellant	)	

APPEALED FROM THE CIRCUIT COURT FOR MACON COUNTY, TENNESSEE, THE HONORABLE WILLARD HAGAN, JUDGE.

(Filed April 27, 1979)

FRANK D. FARRAR, Scottsville Road, Lafayette, Tennessee 37083; and SOLON FITZPATRICK, Carthage, Tennessee 37030, Attorneys for Plaintiff-Appellee.

JAMES W. CHAMBERLAIN, P. O. Box 98, Lafayette, Tennessee 37083, Attorney for Defendant-Appellant.

AFFIRMED and REMANDED.

Frank F. Drowota, III,
Judge.

Opinion

In this divorce case no appeal is taken from the findings of the trial judge that appellee, Jack Porter, is entitled to an absolute divorce. Appellant, Evelyn Porter, concedes that the testimony is clear and convincing that Jack Porter was entitled to an absolute divorce on the grounds of cruel and inhuman treatment. The sole questions on appeal deal with child custody and the division of property.

On July 19, 1978, a final decree was entered in the trial court awarding custody of the parties' thirteen year old son to Jack Porter and providing that Evelyn Porter was not required to contribute to the support of her son. The court awarded Evelyn Porter "her Porter Realty Company, all assets of same including any and all savings and/or checking accounts, her 1973 Chevrolet automobile and her personal belongings, and will assume the indebtedness thereon." The court then found that:

> All of the remaining joint property and assets of the Parties, including the real estate with the improvements thereon, the household furnishings, the cattle and farming equipment, and all other assets of every kind and character, are hereby divested out of the Defendant, Evelyn Porter, and vested in the Plaintiff, Jack Porter. The Plaintiff, Jack Porter, will assume all joint obligations, promissory notes and mortgages against the real estate and personal property and the Defendant, Evelyn Porter, will be held harmless in the payment thereof.

Evelyn Porter has appealed from the property division and child custody portions of the final divorce decree.

Appellee has filed a motion to strike the bill of exceptions because the exhibits introduced into evidence at

trial were neither filed and identified by the clerk nor authenticated by the trial judge. A bill of exceptions will be stricken if the record discloses that it does not contain all the evidence. *Johnson v. Johnson,* 185 Tenn. 400, 404, 206 S.W.2d 400 (1947). In *Cosmopolitan Life Ins. Co. v. Woodward,* 7 Tenn. App. 394, 402 (1928), this Court held that "in order to make exhibits a part of the bill of exceptions it must affirmatively appear that they were authenticated as such by the trial judge and filed by the clerk." Five documents marked exhibits have been forwarded to this Court. None of the documents were filed by the clerk nor authenticated by the trial judge.

One of the issues raised on appeal deals with the division of property. Unauthenticated Exhibit 4, a picture of appellant, throws no light on the issues raised on appeal and we would not strike the bill of exceptions if this were the only exhibit. *State v. Stewart,* 46 Tenn. App. 75, 88, 326 S.W.2d 688 (1959). However, in examining the other unauthenticated exhibits it appears that Exhibit 2, appellant's 1977 income tax return, and Exhibit 3, appellant's diary, are material to the issues raised on appeal. Exhibit 1 and Exhibit 5, although material, are sufficiently covered in the testimony of Evelyn Porter. Mrs. Porter was examined and testified with reference to many of the matters found in her diary, Exhibit 3. However, her diary covered a period from November 17, 1962, to April 5, 1977, and there is material evidence in the diary which does not appear in the authenticated bill of exceptions. The trial court obviously relied heavily on the diary. Appellee's motion to strike the bill of exceptions is well taken and shall be granted.

This appeal must stand on the technical record alone. Appellant's assignments of error go to the evidence intro-

duced at trial and in the absence of a bill of exceptions this Court must affirm the judgment of the trial court.

We hesitate to affirm upon a technicality, patricularly when the custody of a child is involved. We have therefore informally considered the bill of exceptions as filed and the unauthenticated exhibits.

Appellee relying upon language found in *Underwood v. Hill*, 10 Tenn. App. 608 (1959) contends that the findings of the trial judge are binding as a verdict of a jury, the material evidence ruling being applied. Therefore a threshold question which must be resolved is whether this Court as the reviewing court shall treat the decree of the trial judge with respect to the facts as the findings of a jury, or whether we review this cause *de novo* under T.C.A. §27-303.

This case began as a jury case. However, after the testimony of the defendant, Mrs. Porter, who was put on as a hostile witness by the plaintiff, defendant's counsel moved that the jury be discharged and dismissed because his client had admitted acts which constituted cruel and inhuman treatment. Plaintiff's counsel concurred in the motion. The court dismissed the jury with the stipulation and understanding by and between the parties and the court that the court would enter a judgment in favor of plaintiff, Jack Porter, against defendant, Evelyn Porter, due to her misconduct. The matter then proceeded to be heard before the trial judge without a jury.

Appellee cites the following language from *Underwood v. Hill*, 10 Tenn. App. 608, 618:

> "Where a jury is demanded by complainant and such is waived at the hearing and the cause heard by the Chancellor upon oral testimony, his finding is

> equivalent to the verdict of a jury." C. S. Boshears et al. v. J. I. Foster et al., 154 Tenn. 494 [1926], citing Choate v. Sewell, 142 Tenn. 487 [1919].

Cole v. Walker, 25 Tenn. App. 302, 158 S.W.2d 57 (1951), explains the apparent inconsistency between the pre-T.C.A. 27-303 cases of *Underwood v. Hill, supra, Boshears v. Foster, supra,* and *Choate v. Sewell, supra.* In *Cole v. Walker* the parties agreed in writing that "the case be tried by the Chancellor sitting as a jury." This Court then held that the effect of the agreement between the parties was to waive the actual presence of the jury and try the case before the Chancellor sitting as court and jury. This Court then stated "[i]f the parties had merely agreed to waive the jury and have an oral hearing before the chancellor, the case would have been a non-jury case tried irregularly and would have been reviewable in the mode provided in Code, section 10622 [now T.C.A. §27-303]." 25 Tenn. App. at 396.

In the case at bar the parties did not agree to have the case tried by the trial judge sitting as a jury. The parties merely agreed to waive the jury and have an oral hearing before the trial judge. Our review will therefore be *de novo* on the record of the trial court. However, we must presume that the trial court was correct unless the preponderance of the evidence is otherwise. T.C.A. §27-303.

We have carefully reviewed the evidence and we cannot say that it preponderates against the trial court's findings with reference to the division of property and child custody. The trial court made the following findings of fact with which we agree. That Mr. Porter had not done anything wrong. That he loved his wife and his family. That Mrs. Porter had "run openly, notoriously, adulterously with another man in various cities and

towns." That "she left home because of this other man that she went with and in front of her son who saw her on many occasions and it disturbed him." The court then held that "the child's custody would have to be committed to the father because I have to look to the general welfare."

With reference to the division of property the court found that "[t]he proof is that she is a diligent, hard worker and makes money in the real estate business and the business is making more than the farm and that she is able to make her own way."

Appellant here as in *Edwards v. Edwards*, 501 S.W.2d 283 (Tenn. App. 1973), argues she was improperly deprived of the custody of her child as punishment for her conduct. In *Edwards* the Court stated that:

> It is correct that the placement of custody should not be used solely to punish a parent for misconduct; however, misconduct does frequently reflect upon relative fitness or unfitness for custody; and, to this degree and for this purpose, misconduct of parents may properly be considered in the determination of custody.

501 S.W.2d 291.

In this case the trial judge was not in error in considering Mrs. Porter's misconduct. Appellee's thirteen year-old son can continue to be raised on the farm on which he grew up. We find no error in the trial court's award of custody.

We also find no error in the division of property. Appellant stated that she usually makes in the real estate business about the same as the farm makes. If we were to divide the farm and cattle we would be stripping Mr.

Porter of his sole means of support. He has farmed almost his entire life. With custody of his son he needs this means of support. Mrs. Porter has her own means of support.

As Judge Todd stated in *Edwards v. Edwards*, 501 S.W.2d at 292, "the complete divestiture of appellant's interest in joint property is based upon the placing of primary burden of support of the children upon the father by the order of custody, and that in any future proceedings between the parties in reference to child support, the division of property in said decree will be a proper matter for consideration.

The judgment of the trial judge is affirmed. The cause is remanded to preserve the continued supervisory jurisdiction of the trial court in respect to the welfare of the minor child. The costs of this appeal are adjudged against appellant.

Affirmed and remanded.

/s/ Frank F. Drowota, III, Judge

Shriver, P. J., concurs.
Todd, J., concurs.

APPENDIX II

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EVELYN PORTER	)	
	)	
PETITIONER	)	
	)	
vs.	)	MACON LAW
	)	
JACK E. PORTER	)	
	)	
RESPONDENT	)	

Memorandum on Petition for Writ of Certiorari

(Filed July 30, 1979)

Upon consideration of the petition for the writ of certiorari, the briefs of counsel and the entire record, we are of the opinion that the Court of Appeals reached the correct conclusion.

The writ is respectfully denied.

Per Curiam

APPENDIX III

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EVELYN PORTER	)	
	)	
PETITIONER	)	
	)	
vs.	)	MACON LAW
	)	
JACK E. PORTER	)	
	)	
RESPONDENT	)	

Memorandum on Petition to Rehear

(Filed ~~July 30~~ Sept 17, 1979)

The petition to rehear advances no arguments that were not considered by the Court in passing upon the petition for the writ of certiorari; accordingly, it is repectfully denied.

Per Curiam

APPENDIX IV

IN THE CIRCUIT COURT FOR MACON COUNTY, TENNESSEE

JACK E. PORTER	)	
	)	
PLAINTIFF-COUNTER-DEFENDANT,	)	
	)	
vs.	)	FILE NO. 1116
	)	
EVELYN PORTER,	)	
	)	
DEFENDANT-COUNTER-PLAINTIFF.	)	

Findings of Fact and Conclusions of Law

THE COURT: The court has listened very attentively to all the proof in this case that was introduced on yesterday and I find from that proof a diary of Ms. Porter that throughout the years she lived a reasonably happy life with her family until she went out on the public and started work, which is the case so many times we know of now. As long as she was at home and on the farm with her family, she . . . they got along real well. They worked. She worked and he worked. I don't accept the proposition that's inferred that he was a shiftless worker. I don't accept any inference there that he has any faults in this case whatsoever. He's clean. Most of the divorces here are six one and half a dozen the other in fault. That's not the case here. Mr. Porter hasn't done anything. He loved his wife over and beyond what most of us do and his family and

he didn't do anything to precipitate the termination of his marital relation that we're into today; but after his wife started to work she began to contact other folks and other fellows and she thought there was greener pasture somewhere and she became infatuated, involved in grossing enough land. Now she's not entitled to any credit, Mr. Chamberlain, in testifying the truth about what she did because there was no other way for her to testify. Her conduct with her paramour had become some opened [*sic*] and so notorious and so well known and so well documented that it has been [*sic*] quite a fallacious thing for her to come in here and say anything else, it might have been alright if she kept her mouth closed than to said anything, but she has run openingly, notoriously, adulterously with another man in various cities and towns, various trips, paying the bill herself she loved him so good on these trips. Now can a husband or a wife after twenty-three years accumulating go out and be guilty of that kind of conduct and then receive a stamped approval of the court by saying she ought to get her half, normally they get half when it's just a dispute, but she contends that she's justified because she didn't love her husband. Well if she didn't love her husband, wanted to separate from him and remain a lady, then she would have been entitled consideration; but that's not the case because she left home because of this other man that she went with and in front of her son who saw her on many occasions and it disturbed him; and in the course of a while, he finally got used to it and to the knowledge of adultery to her son, twelve year old boy. I can't . . . I can't in good conscience and integrity as Circuit Court look with any grace on that, look with any favor on it with any approval of it. I see a lot of justification for people separating and they do it all the time but not under these circumstances. It's

true these people worked hard and they've accumulated some property and some debts; but it's the opinion of this court and I so hold that Ms. Porter is not entitled to any alimony. I can't give her alimony. Under the law it provides that I can adjust property rights but I can't give her any alimony because I'm going to grant the plaintiff, the original plaintiff, a divorce; and under the circumstances I don't think I could give her custody of the child. I think the child's custody would have to be committed to the father because I have to look to the general welfare and she's living and has been in an illicit relationship which we all know about and that's not in the promotion of the child's interest and welfare that the child remain with her under those circumstances knowing what he knows. I grant the original complainant, Mr. Porter, a divorce, custody of the child and award Ms. Porter no property except her real estate business. If he has an interest in that, she's got that. She can have that and her car and any personal items that she might have in the house by way of furnishings. The proof is that she is a diligent, hard worker and makes money in the real estate business and the business is making more than the farm and that she is able to make her own way and that will be the judgment of the court.

APPENDIX V

IN THE TENNESSEE COURT OF APPEALS
FOR THE MIDDLE SECTION
AT NASHVILLE

JACK E. PORTER	)	
	)	
v.	)	MACON LAW
	)	
EVELYN PORTER	)	

Notice of Appeal to the Supreme Court of the United States

(Filed December 5, 1979)

Notice is hereby given that Evelyn Porter, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Tennessee Court of Appeals for the Middle Section (Certiorari denied) affirming the ruling of the Trial Court, entered in this action on April 27, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Grant W. Smith
Grant W. Smith
Counsel for Appellant

Supreme Court, U. S.
FILED
JAN 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-933

EVELYN PORTER,
Appellant,

vs.

JACK E. PORTER,
Appellee.

On Appeal From the Tennessee Court of Appeals,
Middle Division

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-933

EVELYN PORTER,
Appellant,

vs.

JACK E. PORTER,
Appellee.

On Appeal From the Tennessee Court of Appeals,
Middle Division

MOTION TO DISMISS OR AFFIRM

MOTION

Pursuant to Rule 16 of the United States Supreme Court, Appellee respectfully moves the Court for an order dismissing this appeal, or, alternatively affirming the judgment of the Tennessee Court of Appeals, from which this appeal is taken.

GROUNDS FOR MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Tennessee Court of Appeals upon the following grounds: (1) that the validity of the state statute challenged was not drawn into question in the state courts; (2) that the alleged unconstitutional application of the state statute was not timely or properly raised, or expressly passed on by the state courts; (3) the judgment of the state court rests on an adequate non-federal ground; and (4) a substantial federal question has not been presented.

QUESTIONS PRESENTED

I. Was the validity of TENN. CODE ANN. §36-825 drawn into question in the state courts so as to confer jurisdiction on this Court pursuant to 28 U.S.C. §1257(2)?

II. Was the alleged unconstitutional application of TENN. CODE ANN. §36-825 timely or properly presented to the Tennessee courts?

III. Was the state court's decision based upon an adequate non-federal ground?

IV. Has a substantial federal question been presented to the Court?

STATEMENT OF THE CASE

A. Proceedings Below

This suit was originally instituted in the Circuit Court of Macon County, Tennessee by Appellee, pursuant to TENN. CODE ANN. §§36-801 *et seq.*, seeking an absolute divorce, custody of the parties' minor child and a division of jointly owned property. The Trial Court awarded Appellee an absolute divorce and custody of the minor child. Appellant was relieved

of any obligation to contribute to the support of the child in the future and was further awarded "Porter Realty Company, all assets of same including any and all savings and/or checking accounts, her 1973 Chevrolet automobile and her personal belongings . . ." [J.S. at A 2] All of the remaining jointly held property and assets of the parties were awarded to Appellee, including the real estate and improvements thereon, household furnishings, cattle, farming equipment and all other assets. Appellee was required to assume all joint obligations, promissory notes and mortgages against the real estate and personal property and to hold Appellant harmless with respect to payment of all such joint obligations.

The case was appealed by Appellant to the Tennessee Court of Appeals. The Court of Appeals affirmed the judgment of the trial court in all respects. Thereafter, Appellant petitioned the Tennessee Supreme Court for a writ of certiorari to review the decision of the Tennessee Court of Appeals. The Petition for Certiorari was denied and, subsequently, Appellant petitioned for a rehearing on the Court's denial of certiorari. The Petition to Rehear was likewise denied by the Tennessee Supreme Court.

B. The Decision Below

A Motion to Strike the Bill of Exceptions (Transcript of the Testimony) was filed in behalf of Appellee in the Tennessee Court of Appeals upon the ground that certain exhibits introduced into evidence at the trial were neither filed and identified by the Clerk nor authenticated by the trial judge. The Court of Appeals found that all exhibits complained of, with the exception of one, were material to the issues on appeal and that none were filed, identified or authenticated as required by State law. Accordingly, Appellee's motion was sustained and the transcript of the testimony stricken. The Court of Appeals therefore concluded:

> "Thus Appellant must stand on the technical record alone. Appellant's assignments of error go to the evidence introduced at the trial and in the absence of a bill of exceptions this Court must affirm the judgment of the trial court." [J.S. at A3-A4]

The Tennessee Court of Appeals then went further, primarily because the custody of a child was involved, to "informally" consider the bill of exceptions, including the unauthenticated exhibits. The Court concluded that there was no error in the award of child custody and no error in the division of property. The opinion of the Tennessee Court of Appeals is recited in full in Appendix I to Appellant's Jurisdictional Statement [J.S.] to this Court.

Appellant's Petition for Certiorari to the Tennessee Supreme Court and Petition to Rehear upon the denial of the Petition for Certiorari were denied by the Tennessee Supreme Court without opinion. The Tennessee Supreme Court's memoranda denying the Petition for Certiorari and the Petition to Rehear are recited in full in Appendices II and III of Appellant's Jurisdictional Statement.

ARGUMENT

I.

This Court Has No Jurisdiction Under 28 U.S.C. §1257 (2) Because The Validity of TENN. CODE ANN. §36-825 Was Not Drawn Into Question in the State Court

A.

Appellant Advanced No Argument In The State Courts That TENN. CODE ANN. §36-825 Was So Vague As To Be Void Under The Fourteenth Amendment To The Constitution Of The United States.

Pursuant to 28 U.S.C. §1257(2), this Court has appellate jurisdiction to review on appeal any final judgment or decree rendered by the highest court of a state in which the validity of a state statute was questioned as violative of federal law and a decision rendered in favor of the statute's validity. It is well established, however, that the Court has no jurisdiction to review the *validity* of a state statute that was not challenged in the state courts. *E.g. Tacon* v. *Arizona,* 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed. 2d 346 (1973); *Edelman* v. *California,* 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953); *International Steel & Iron Co.* v. *National Surety Co.*, 297 U.S. 657, 56 S.Ct. 619, 80 L.Ed. 961 (1936). Aside from the pure question of the statutory requirements of 28 U.S.C. §1257(2), the Court has recognized that there are "sound reasons" for this, particularly since:

> [q]uestions not raised below are those on which the record is very likely to be inadequate, since it is certainly not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality.

Cardinale v. *Louisiana*, 394 U.S. 437, 439, 89 S.Ct. 1161, 1163, 22 L.Ed. 2d 398, 400 (1969).

An examination of the records and briefs filed in *any* of the Tennessee courts reveals that *nowhere*, at any stage of the proceedings, did Appellant argue, or even suggest, that TENN. CODE ANN. §36-825 (1977) was "so vague as to be void under the Fourteenth Amendment" or invalid under any other provision of the federal constitution. Indeed, Appellant's Jurisdictional Statement does not insist that this issue was raised in the state courts.

American Motorists Ins. Co. v. *Starnes*, 425 U.S. 637, 96 S.Ct. 1800, 48 L.Ed. 2d 263 (1976), relied upon by Appellant, is obviously not in point because there the appellant presented to the Texas courts a clear constitutional challenge to the state's venue statute. Similarly, in *New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184 (1928), the Court, while recognizing that "no particular form of words or phrases is essential," found that the appellant had brought to the attention of the state court the claim of invalidity "with fair precision and in due time." Of equal importance, the *Zimmerman* Court noted that the state court recognized and actually decided the federal question. 278 U.S. at 67-69, 49 S.Ct. at 63, 73 L.Ed. at 187-88. In the instant case, however, there are "no words or phrases" in the record or briefs filed in the state courts from which this Court can find the slightest hint of a constitutional challenge to the validity of TENN. CODE ANN. §36-825 (1977).

B.

The Validity of TENN. CODE ANN. §36-825 Under The Federal Constitution Was Neither Considered Nor Decided By The Tennessee Courts.

Appellant misplaces reliance upon *Dyke* v. *Taylor Implement Co.*, 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed. 2d 538 (1968). *Dyke*

stands for a well established exception to the general rules governing how and when a federal question must be presented to the state court. There, in response to the contention that the appellant had failed to properly raise federal questions in the state court, this Court noted that the state supreme court had expressly considered and rejected the proposition that the fourteenth and sixth amendments to the federal constitution required that petitioner be given a jury trial. The Court held that jurisdiction existed under 28 U.S.C. §1257(2) irrespective of the appellant's failure to properly raise the issues *because the federal question had actually been passed upon by the highest court of the state.* 391 U.S. at 217 n.3, 88 S.Ct. at 1473 n.3, 20 L.Ed. 2d at 541 n.3. *See also Cox Broadcasting Corp.* v. *Cohn* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 328 (1975); *Boykin* v. *Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969); *Raley* v. *Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed. 2d 1344 (1959).

The Tennessee courts did not pass upon any constitutional objection to the validity of TENN. CODE ANN. §36-825 (1977) nor was any presented by Appellant. Reviewing the case *de novo*, the Tennessee Court of Appeals merely held that the evidence did not preponderate against the trial courts' findings with reference to the division of property and child custody. There is no mention of TENN. CODE ANN. §36-825 in the Court's opinion much less a consideration of its validity. Moreover, it is readily apparent from the record that this issue was not brought to the attention of the state courts because notice was never given to the Attorney General of the State of Tennessee as required by Rule 24.04 of the Tennessee Rules of Civil Procedure:

24.04 Notice to Attorney General when statute, Rule or Regulation is Questioned

When the validity of a statute of this state or an administrative rule or regulation of this state is drawn in question in any action to which the State or an officer or agency is not a party, the court shall require that notice be given the Attorney General, specifying the pertinent statute, rule or regulation.

The clear purpose of a notice requirement is to permit intervention by the state attorney general if necessary to protect the public's interest in the result of the suit. *See e.g. Cummings* v. *Shipp*, 156 Tenn. 595, 3 S.W.2d 1062 (1928). The fact that no notice was given serves to reinforce Appellee's position that no argument concerning the validity of TENN. CODE ANN. §36-825 (1977) was presented to the Tennessee courts.

C.

An Alleged Unconstitutional Application of TENN. CODE ANN §36-825 Does Not Draw Into Question The Validity Of The Statute Within The Meaning Of 28 U.S.C. §1257(2).

In support of the contention that jurisdiction has been properly invoked under 28 U.S.C. §1257(2), Appellant argues that:

> [i]n the Tennessee Court of Appeals . . . appellant . . . drew into question the *constitutionality of the Trial Court's application* of [TENN CODE ANN.] §36-825 . . . by citing . . . the case of *Kittrell* v. *Kittrell,* 56 Tenn. App. 584, 409 S.W.2d 179 (1966) . . .

Appellant's Jurisdictional Statement at 4 (emphasis supplied). It is apparent that Appellant fails to recognize the distinction between a constitutional challenge to the validity of a state statute and an alleged unconstitutional application of the statute. The latter furnishes no basis for jurisdiction under 28 U.S.C. §1257(2). Thus, appeal under 28 U.S.C. §1257(2) does not lie if

a party's claim is that there has been an erroneous exercise of authority under a valid statute. *Hanson* v. *Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958); *Zucht* v. *King,* 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922); *Ireland* v. *Woods,* 246 U.S. 323, 38 S.Ct. 319, 62 L.Ed. 745 (1918); *Philadephia & Reading Coal & Iron Co.* v. *Gilbert,* 245 U.S. 162, 38 S.Ct. 58, 62 L.Ed. 221 (1917); *United States ex rel. Champion Lumber Co.* v. *Fisher,* 227 U.S. 445, 33 S.Ct. 329, 57 L.Ed. 591 (1913).

In *Ireland, supra,* the Court made it clear that a dispute as to the facts upon which authority is exercised is not a dispute as to the validity of the authority:

> [T]here is a difference between a question of power to pass a law and its construction, and a difference beween the endowing of an officer with authority and his erroneous exercise of that authority. As was said by Chief Justice Fuller . . .: 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed.'

246 U.S. at 330, 38 S.Ct. at 322, 62 L.Ed. at 750-51.

In *Hanson* v. *Denckla, supra,* appellants contended that the Florida court's exercise of jurisdiction under a Florida statute violated Section One of the Fourteenth Amendment to the United States Constitution. In considering whether the Court had jurisdiction under 28 U.S.C. §1257(2) the Court noted appellant's contention in the state court in which it was argued that:

> [t]he exercise by this Court of the jurisdiction sought to be invoked by the plaintiffs herein would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and, in particular, Section 1 of the Fourteenth Amendment to the United States Constitution.

357 U.S. at 244 n.4, 78 S.Ct. at 1234 n.4, 2 L.Ed. 2d at 1292 n.4. In holding that the Court had no jurisdiction the Court stated:

> The appeal is predicated upon the contention that as applied to the facts of this case the Florida statute providing for constructive service is contrary to the Federal Constitution. 28 U.S.C. §1257(2). But in the state court appellants (the "beneficiaries") did not object that the statute was invalid as applied, but rather that the effect of the state court's exercise of jurisdiction in the circumstances of this case deprived them of a right under the Federal Constitution. Accordingly, we are without jurisdiction of the appeal and it must be dismissed.

357 U.S. at 244, 78 S.Ct. at 1234, 2 L.Ed. 2d at 1292. In the instant case, Appellant, in the memorandum brief filed in support of the Petition to Rehear in the Tennessee Supreme Court, contended that:

> [b]y construing Tenn. Code Ann. [§36-825] so as to yield such an arbitrary and unreasonable result, the Courts have extended their jurisdiction beyond the limits erected by the guaranties of due process of the United States and the Tennessee Constitution.

This language, strikingly similar to that employed in *Hanson, supra,* as well as Appellant's own admission in her jurisdictional statement to this Court that her argument was "that the statute had been applied in an unconstitutional fashion" [J.S. at 5] makes clear the fact that the *validity* of TENN. CODE ANN. §36-825 (1977) has not been questioned in this case. Since this is a prerequisite to this Court's jurisdiction under 28 U.S.C. §1257(2), the appeal must be dismissed for want of jurisdiction.

II.

This Court Must Decline Jurisdiction Because The Alleged Unconstitutional Application of TENN. CODE ANN. §36-825 Was Not Timely Or Properly Raised In The Tennessee Courts.

A.

This Court Requires That A Federal Question Be Presented Expressly, Rather Than Inferentially, In The State Court Proceedings In Order To Entertain Jurisdiction Of An Appeal.

Appellant contends that an unconstitutional application of TENN. CODE ANN. §36-825 (1977) was drawn into question in the Tennessee Court of Appeals by citing *Kittrell* v. *Kittrell,* 56 Tenn. App. 584, 409 S.W.2d 179 (1966) in the brief filed therein on behalf of Appellant. The citation to *Kittrell* was contained in the body of the brief rather than in appellant's assignments of error. Appellant's Assignment of Error No. 1 in the Tennessee Court of Appeals provided as follows:

> **Assignment of Error No. 1:**
>
> The Court erred in divesting Appellant of all of her interests in the joint property of the parties.
>
> This was error because the proof conclusively shows that Appellant contributed substantially to the accumulation of the joint worth of the parties and the decisions in this State require that Appellant be awarded one-half of the joint property of the parties.
>
> This was further error because the Trial Judges's order divested Appellant of property rights which had been formerly vested in her as a tenant by the entirety, contrary to the case law in Tennessee cited in the brief.

None of the Assignments of Error made any specific assertion of an alleged unconstitutional application of TENN. CODE ANN. §36-825.

In order to raise an issue on appeal to the Tennessee Court of Appeals it was necessary to specifically assign as error the alleged unconstitutional application of the statute:

* * *

> The assignment of errors shall contain in the order herein stated:
>
> * * *
>
> (2) A statement of the errors of fact or law relied upon to reverse or modify the [judgment below], showing specifically wherein the action complained of is erroneous and how it prejudiced the rights of the appellant, with references to the pages of the record where the ruling of the court on matters constituting errors of law appeared; and in case it is an error of fact, to the pages of the record where the testimony relied upon to sustain the same is to be found.

TN. CT. APP. RULE 12(2). The decisions of the Tennessee courts subscribe to the proposition that the courts "will not search through many pages of the record to discover points of alleged constitutional invalidity [of a statute], none being specified in the assignment [of error]." *Commerce Union Bank* v. *Gillespie,* 178 Tenn. 179, 191, 156 S.W.2d 425, 429-30 (1939). *See also Pollard* v. *Beene,* 20 Tenn. App. 83, 95 S.W.2d 942 (1936). Furthermore, the Tennessee courts have consistently held that an assignment of error to the effect that the lower court's decision is "not in conformity with the law" is considered too general and indefinite to present anything for review. *See, e.g., Cope* v. *Hembree,* 487 S.W.2d 647 (Tenn. 1972); *State ex rel. Melton* v. *Nolan,* 161 Tenn. 293, 30 S.W.2d 601 (1930); *Smith* v. *Uffelman,* 509 S.W.2d 229 (Tenn. App. 1974); *Greer* v. *Underwood,* 62 Tenn. App. 225, 461 S.W.2d 35 (1970); *Brown* v. *Allright Auto Parks, Inc.,* 61 Tenn. App. 543, 456 S.W.2d 660 (1970); *Jarman* v. *Export Ins. Co.,* 59 Tenn. App. 245, 439 S.W.2d 785 (1968).

It is clear that neither the citation to *Kittrell* in Appellant's brief nor the Assignment that divestiture of plaintiff's property rights was "contrary to the case law in Tennessee" was sufficient under Rule 12 of the Tennessee Court of Appeals' Rules or the Tennessee decisions to raise a constitutional issue in the Tennessee courts. It is equally clear that the Tennessee Court of Appeals did not interpret Appellant's Assignment of Error as having raised any such issue since the Court's opinion makes no reference whatever to *Kittrell* or TENN. CODE ANN. §36-825.

In *Beck* v. *Washington,* 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed. 2d 98 (1962), the Court, under strikingly similar circumstances, held that a challenge to a state statute was not properly before it since the argument was never properly presented to the state courts. In *Beck,* aside from the fact that no challenge was made in the trial court, appellant had failed to comply with a state appellate court rule that prescribed the manner in which contentions were to be brought to the court's attention. The rule there required that issues be "definitely pointed out in the 'assignments of error' in appellant's brief." In holding that the arguments failed to comply with this rule, the Court pointed out that mere generalized attacks were not enough to bring the issue before the state court and noted that the state courts would not "search the brief proper to find specific contentions which should have been listed in assignments of error." Instead, merely setting the issue forth in one sentence in the body of the brief as opposed to arguing it was considered by the state court to have been an abandonment or waiver. Under the authority of *Beck,* this Court should now decline jurisdiction of the instant appeal.

Moreover, this Court has often held there must be something more than a vague and inferential suggestion of a violation of rights under the constitution of the United States presented to the state court in order to give it the limited authority to review state court judgments. *Thomas* v. *Iowa,* 209 U.S. 258, 28 S.Ct. 487, 52 L.Ed. 782 (1908). As the Court has stated:

> [T]he jurisdiction of this court to re-examine the final judgment of a state court cannot arise from inference but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right.

Levy v. *Superior Court,* 167 U.S. 175, 177-78, 17 S.Ct. 769, 770, 42 L.Ed. 126, 127 (1897) *citing F.G. Oxley Stave Co.* v. *Butler County,* 166 U.S. 648, 17 S.Ct. 709, 41 L.Ed. 1149 (1897). Applying these principles, the Court has held that a claim that there has been a "denial of due process," or that a decision is against "constitutional rights," or "the 14th amendment" does not of itself raise a federal question with sufficient distinction to give the Court jurisdiction to consider whether there has been a violation of the Fourteenth Amendment. *Thomas* v. *Iowa, supra, Clarke* v. *McDade,* 165 U.S. 168, 17 S.Ct. 284, 41 L.Ed. 673 (1897). Therefore, Appellant's attempt to raise a federal question through the mere citation of a case must fail for precisely the same reasons; and without a properly presented federal question this Court should now refuse jurisdiction of the case.

B.

Appellant's Attempt To Raise The Alleged Unconstitutional Application of TENN. CODE ANN. §36-825 In the State Supreme Court For The First Time In A Petition For Rehearing Is Insufficient Both Under State Appellate Procedure And As An Attempt To Vest Jurisdiction In The United States Supreme Court.

The appellate rule in effect during the pendency of this case in the state court provided in pertinent part as follows:

> The petition shall state the substance of the case so as to show a prima facie error or errors in the judgment or decree of the intermediate court and how petitioner is prejudiced thereby.

> It shall be accompanied by an assignment of errors and a brief in support thereof, in the form required by Rules 14 and 15 applicable to cases brought directly from trial courts to this Court. Counsel shall have the right to use and file in this Court their briefs in the intermediate court, making apt refrences thereto, PROVIDED, HOWEVER, *assignments of error in this Court must be redrafted expressly directed to error in the judgment or decree of the intermediate court, showing specifically wherein the opinion of that court is erroneous.* (emphasis supplied)

TN. SUP. CT. RULE 12. An examination of Appellant's petition for certiorari in the Tennessee Supreme Court discloses that no assignment of error addressed any alleged unconstitutional application of TENN. CODE ANN. §36-825 (1977). Therefore, under settled state appellate procedure, the issue was not properly before the state supreme court and could not be reviewed by it. *Dorrier* v. *Dark,* 537 S.W.2d 888, *reh. denied,* 540 S.W.2d 658 (Tenn. 1976); *State* v. *James Sanford Agency,* 167 Tenn. 339, 69 S.W.2d 895 (1934); *Wilson Laboratories* v. *Webster-Warnock Chem. Co.,* 155 Tenn. 296, 291 S.W. 835 (1927); *Richmond Type & Electrotype Fdy.* v. *Carter,* 133 Tenn. 489, 182 S.W. 240 (1915). Issues thus not pursued, discussed or argued are treated as waived in the appellate courts. *Hoover Motor Express Co.* v. *Fort,* 167 Tenn. 628, 72 S.W.2d 1052, *appeal dismissed* 293 U.S. 529, 55 S.Ct. 149, 79 L.Ed. 638 (1934); *Maryville Housing Authority* v. *Ramsey,* 484 S.W.2d 73 (Tenn. App. 1972).

Appellant's attempt to raise the issue for the first time in the state supreme court by way of a petition to rehear is likewise fatal to the appeal. The Tennessee Supreme Court in a civil case will not pass upon any question raised for the first time on appeal or consider, on rehearing, that which was not in issue in the original hearing. *Harrison* v. *Schrader,* 569 S.W.2d 822 (Tenn. 1978); *Royal Jewelers Co. of Knoxville* v. *Hakeo,* 185 Tenn.

254, 205 S.W.2d 963 (1947); *City of Nashville* v. *Wilson,* 88 Tenn. 407, 12 S.W. 1082 (1889). This rule is appropriate and necessary to the orderly administration of justice and without it there would be no end to a case on appeal. Moreover, the Tennessee courts have held the rule to be "especially applicable" in cases of alleged unconstitutionality of state statutes. *Tennessee Oil Co.* v. *McCanless,* 178 Tenn. 683, 157 S.W.2d 267, *on rehearing* 178 Tenn. 700, 162 S.W.2d 1081, *appeal dismissed* 317 U.S. 588, 63 S.Ct. 34, 87 L.Ed. 482 (1942). In the *Tennessee Oil* decision, this Court recognized the well settled rule that appeals from state court decisions must be dismissed for want of properly presented federal questions when the federal question is for the first time raised by petition for rehearing in the state appellate court. *See also Herndon* v. *Georgia,* 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935); *Bilby* v. *Stewart,* 246 U.S. 255, 38 S.Ct. 264, 62 L.Ed. 701 (1918); *Forbes* v. *State Council of Virginia,* 216 U.S. 396, 30 S.Ct. 295, 54 L.Ed. 534 (1910); *McMillen* v. *Ferrum Mining Co.,* 197 U.S. 343, 25 S.Ct. 533, 49 L.Ed. 784 (1905). This Court should likewise dismiss the appeal due to Appellant's failure to properly present a federal question to the Tennessee Supreme Court.

III.

This Court Must Decline Jurisdiction Because The Judgments of the Tennessee Courts Rest Upon Adequate Non-Federal Bases.

A.

The Tennessee Court of Appeals' Failure to Address the Alleged Unconstitutional Application Of TENN. CODE ANN. §36-825 Was Justified By Appellant's Failure To Follow State Appellate Procedures, Which Is An Adequate And Independent State Ground For The Decision.

This Court, in *Murdock* v. *Memphis,* 87 U.S. 590, 22 L.Ed. 429 (1875), recognized the rule that the United States Supreme

Court will not review a case, even though it might contain a federal question, if there is an adequate state ground that supports the decision of the state court. There can be no review if the state court has decided the case exclusively on some ground of state law, and has never reached a federal question present in the case. *Johnson* v. *New Jersey,* 384 U.S. 719, 735-36, 86 S.Ct. 1772, 1782, 16 L.Ed. 2d 882, 893 (1966); *McCoy* v. *Shaw,* 277 U.S. 302, 48 S.Ct. 519, 72 L.Ed. 891 (1928). Furthermore, a failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in the United States Supreme Court, so long as the state has a legitimate interest in enforcing its procedural rule. *E.g. Michigan* v. *Tyler,* 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed. 2d 486 (1978); *Henry* v. *Mississippi,* 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed 2d 408 (1965). In the instant case, the Tennessee Court of Appeals was justified fully in failing to consider the alleged constitutional infirmity of TENN. CODE ANN. §36-825 (1977) due to Appellant's failure to follow established appellate procedure as hereinabove note—the failure to meet the state's standard for definiteness as well as failure to present a proper bill of exceptions to the court for review. These procedural defaults constitute independent and adequate state grounds for the Tennessee courts' decision, which should now preclude this Court from a review thereof.

As hereinabove noted, Appellant's failure to properly present the alleged constitutional issue to the Tennessee Court of Appeals would have precluded review in that Court. This was recognized as constituting an adequate state ground and thus precluding United States Supreme Court review in *Stembridge* v. *Georgia,* 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 (1952). There, as in the instant case, the presentation of the constitutional question to the Georgia appellate court did not meet that state's requirement of definiteness. In dismissing certiorari as improvidently granted, the Court stated that:

> Where the highest court of the state delivers no opinion [on the federal question] and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment.

343 U.S. at 547, 72 S.Ct. at 837, 96 L.Ed. at 1134 (emphasis by the Court). Therefore, in the case at bar, even assuming that the issue was raised as Appellant claims, it is clear that these procedural errors *might* have been the reason for the Tennessee Court of Appeals' failure to address the constitutional question.

In its opinion, the Tennessee Court of Appeals, after sustaining Appellee's Motion to Strike the Transcript of the Testimony, expressly held that it must affirm the judgment of the trial court because the Assignments of Error went to the evidence introduced at the trial. Consequently, the Court recognized that it was precluded from examining the evidence underlying the trial court's decision. It is self-evident that without such review no determination could have been made with respect to the alleged unconstitutional application of TENN. CODE ANN §36-825 (J.S. at A3-A4). Appellant now asks this Court to review the decision of a state court based upon issues never properly raised in the state court upon a transcript of testimony stricken by the state court pursuant to settled state law.

In striking the bill of exceptions, the court was following settled Tennessee procedure, the purpose of which is to assure that the record before the appellate court contain all the evidence that was considered by the trial court. *See, e.g. Johnson* v. *Johnson,* 185 Tenn. 400, 206 S.W.2d 400 (1947); *Cosmopolitan Life Ins. Co.* v. *Woodward,* 7 Tenn. App. 394 (1928). This is clearly a legitimate state purpose of the procedural rule and in and of itself constitutes an adequate state ground for the state court's decision. Therefore due to the Court of Appeals' failure to rule upon the purported federal question and the state procedural errors supporting this omission, this Court may not now take jurisdiction to review the judgment.

B.

The Tennessee Supreme Court's Failure to Address The Alleged Unconstitutional Application Of TENN. CODE ANN. §36-825 Is Supported by Appellant's Failure To Follow State Appellate Procedure, Which Is An Adequate And Independent State Ground For The Decision.

The Appellant's failure to assign as error to the Tennessee Supreme Court the alleged unconstitutional application of TENN. CODE ANN. §36-825 (1977) and her subsequent attempt to raise the issue by way of a petition for rehearing were, as hereinabove set forth, additional sufficient grounds for that court to also refuse to review the issue. Therefore, these procedural errors, as was the case in the Tennessee Court of Appeals, constitute adequate state grounds for the decision. The Court must accordingly dismiss the appeal on that basis.

IV.

This Court Must Decline Jurisdiction Because The Case Involves No Substantial Federal Question.

Under 28 U.S.C. §1257(2), there must be a federal question in order to invoke the jurisdiction of the United States Supreme Court. The mere presence of a federal question, however, will not permit review unless that question is a substantial one. An examination of the question sought to be reviewed by Appellant discloses that it is not a substantial federal question and this Court should therefore dismiss her appeal.

In *Bailey* v. *Anderson*, 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945), the Court dismissed an appeal for want of a substantial federal question from a state condemnation proceeding. There, the appellant contended that the statute that allowed the state's entry upon the land and physical alteration thereof in advance of the appointment of commissioners who were to set the value of the land *as applied to him* denied him due process of law. The

United States Supreme Court, however, held that due process merely guaranteed the landowner the opportunity to be heard and to present evidence as to the value of the land taken stating that:

> Here appellant was given full opportunity to be heard and to introduce evidence before the Commissioners. They could, upon the evidence submitted, take into account the alterations of the property after the taking and before the view; such was their duty under the statute. Their award is made subject to judicial review . . . and may be set aside if plainly wrong or without support in the evidence. [citations omitted] In this we find no denial of due process *and appellant's contention presents no substantial constitutional question* . . . .

326 U.S. at 205, 66 S. Ct. at 67-68, 90 L.Ed. at 5 (emphasis supplied). Appellant in the instant case was offered the same procedural benefits. She was given a trial at which she could present evidence; that trial was subject to appellate review and the court's findings could have been set aside if plainly wrong or without support in the evidence had the Appellant properly prepared her appeal. The instant case, therefore, presents no more of a federal question than did *Bailey* and warrants a dismissal of the appeal.

The Court has similarly held that the due process clause of the fourteenth amendment does not enable it to review errors of state law however material those errors might be. For example, in *Baker* v. *Druesedow*, 263 U.S. 137, 44 S. Ct. 40, 68 L.Ed. 212 (1923), a railroad contended that overvaluation of intangibles for purposes of taxation was so gross and palpable as to amount to a denial of due process. The trial court, however, found the valuation to represent the honest judgment of the board and this holding was approved by the state's highest court. The United States Supreme Court refused to grant review, however, noting that "[m]ere errors of judgment are not subject to review

in this [Court]." 263 U.S. at 142, 44 S. Ct. at 42, 68 L.Ed. at 215; *accord Buchalter* v. *New York*, 319 U.S. 427, 63 S. Ct. 1129, 87 L.Ed. 1492 (1943).

In the case at bar, the aforementioned principles compel this Court to dismiss the appeal for want of a substantial federal question. A "mere error in judgment" or an insufficiency of the evidence would not, under the clear language in *Baker, supra,* present a substantial federal question to this Court. Furthermore, as the Appellant herself points out, TENN. CODE ANN. §36-825 (1977) had been specifically construed in the *Kittrell* decision to preclude a taking of property that would violate the fourteenth amendment. Therefore, the Tennessee courts merely *interpreted* the statute and *Kittrell* to determine if the facts fell within those parameters of "justness" and "reasonableness". These are clearly state law questions. Therefore, for want of a substantial federal question, this Court must dismiss the instant appeal.

CONCLUSION

Appellee respectfully urges that this Court dismiss the appeal, or, in the alternative, affirm the decision of the Tennessee Court of Appeals due to Appellant's failure to draw into question in the state court the validity of the statute now challenged; Appellant's failure to timely or properly raise the unconstitutional application of the statute in the state court; the fact that the decision of the state court rests upon adequate non-federal grounds; and the fact that a substantial federal question has not been presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of three (3) copies of the foregoing motion and brief in support thereof was made in accordance with paragraph 1 of Rule 33 of the United States Supreme Court by delivery to Grant W. Smith, Suite 300, Young Executive Building, P.O. Box 24927, Nashville, TN 37202.

THOMAS H. PEEBLES, III